

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
)
Implementation of the Local Competition)
Provisions of the Telecommunications Act)
Of 1996)
)

CC Docket No. 96-98

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

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SUMMARY

In this proceeding, commenters have presented the Commission a clear choice between two different visions of the industry. One vision, propounded by incumbent LECs, is of an industry beset with litigious displays and briefs over arcane issues such as what facilities a particular, hypothetically “viable” competitor may decide to build, or whether accepting rent from a live-in nanny qualifies a home as an “MDU” (and thereby disqualifies it from all unbundled loop entry). In their zeal to effectively repeal the unbundling requirements of the 1996 Act, incumbent LECs in this proceeding have misapplied facts and economics. These proposals would help the ILECs fortify their home-territory bastions and would limit customer choice based upon a series of arcane and litigious inquiries.

The competitive segment of the industry presented a different vision. It is a vision in which entrepreneurs develop, fund, and successfully deploy their entry plans, based on a set of predictable national unbundling rules. In this vision, rival service providers utilize unbundled network elements to build innovative networks capable of supporting advanced services across the nation, even in neighborhoods where ILECs choose not to provide those advanced services. And in this vision, regulators and consumers would not longer have to accept ILEC “excuses” for their refusals to unbundle digitally conditioned loops or provide advanced services.

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The suggestions proposed in the initial comments of several incumbent local exchange carriers would, if implemented, send the U.S. telecommunications industry into a downward spiral of delay characterized by endless litigation and petty squabbling.

Far from the “pro-competitive” and “deregulatory” vision of Congress,¹ the ILEC vision for our industry is one of endless hearings and proceedings before a multitude of regulatory agencies. It would be an industry featuring litigious displays and briefs devoted to arcane issues, such as whether a live-in nanny would allow an ILEC to refuse to unbundle any of the loops serving that residence because it is now an “MDU.”² The incumbent LECs would, through this Kafkaesque process, Balkanize the availability of next generation, broadband services.³

¹ Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996).

² GTE Comments at 68-70, 95 (ILECs should not have to unbundle loops to MDUs).

³ Like the protagonist K. in *The Trial*, CLECs would, upon adoption of any of the ILECs selective loop unbundling proposals, be tossed into a seemingly endless struggle for answers regarding any particular loop order. An attempt to order a loop would trigger scenes similar to K.’s arrest, as the ILEC representative investigates whether the order met a labyrinth of requirements: “You can’t leave, you’re being held. . . . Go to your room and wait. Proceedings are under way and you’ll learn everything in due course. . . . And trials like this last so long, particularly these days! Of course you’d get the proceeds from the depository in the end” Franz Kafka (trans. B. Mitchell), *The Trial* at 5, 6 (1998 ed.).

ILECs have argued that their obligations to unbundle network elements should vary through a maze of geographic and end-user classification rules. The Commission must put itself in the position of consumers – think about what would happen if you want to procure broadband xDSL services from a competitive provider like Covad, but unbundling were only available as incumbent LECs have proposed:

- Do you live in an apartment building? No loop for you.⁴
- Want to buy DSL service from a competitive provider but the incumbent LEC has not, for whatever reason, rolled out service in your neighborhood? If Bell Atlantic, Ameritech, SBC or BellSouth gets their way, watch out – you may get hit with a \$4,000 “conditioning” charge.⁵
- Tired of the apartment building (where there may be no loops for you) and want to realize the American Dream and buy a brand new home? Sorry, still no loop for you.⁶

⁴ GTE Comments at 95.

⁵ SBC Comments at 77 (proposing, at rates above TELRIC, up-front charges for conditioning loops); BellSouth Comments at 36 (agreeing to condition loops, but only for fee). Such charges are already well-documented by CLECs in this docket and must be addressed by the Commission. See Ex Parte Presentation of Covad Communications Company in CC Dockets No. 96-98, June 3, 1999 (documenting Bell Atlantic’s proposed charges of more than \$4,000 for “conditioning” a DSL loop and Ameritech’s actual charges of over \$6,000 for such work); Comments of McLeodUSA at 5-7 (TELRIC pricing applied to unbundled network elements forbids assessment of special construction costs.).

⁶ GTE Comments at 63 n.38, 95 (no unbundled loops available in any “new residential or commercial development.”). This proposal ignores the sharp distinction drawn in transaction cost economics between the *ex ante* contracting environment (competition for the project) and the *ex post* contracting environment (competition after the project is completed). See Oliver E. Williamson, *The Economic Institutions of Capitalism* 61-62 (1985) (“initial bidding merely sets the contracting process in motion. . . . Rivals cannot be presumed to operate on parity, however, once substantial investments in transaction-specific assets are put in place [by the winner.] Winners in such circumstances enjoy advantages over nonwinners, which is to say that parity is upset.”). The simple reality is that a CLEC seeking to serve a new development needs access to elements of the ILEC’s network to serve the residents just as much as access to facilities in older developments.

Rather than putting forward a “network of networks” vision – in which competing network suppliers with overlapping service territories would compete for customers while at the same time interconnecting with one another – the ILEC vision of this industry is one in which they fortify home-territory bastions, inside which consumer choice is severely limited.

This is not a surprising position. ILECs will be much more profitable in a market where monopoly rents can be collected than in markets with multiple providers. Just as they have resisted unbundling pursuant to the old Rule 319, it is no surprise that ILECs now argue for rules that would squelch any hint of competition *via* unbundling at the earliest possible moment.

I. ILECs HAVE MISSTATED FACTS AND APPLIED UNSOUND ECONOMIC AND LEGAL REASONING

The ILECs’ allergic reaction to unbundling leads them to argue that unbundling should no longer be required once they catch even a whiff of an alternative supplier. Despite lip service to competitive analysis, the ILECs, in their zeal to rid themselves of the unbundling obligations, have misstated facts and ignored fundamental principles of economic and legal analysis.

These failures are particularly apparent in ILEC arguments related to dedicated interoffice transport. In fact, ILECs have completely misconstrued demand for this network functionality. As Covad pointed out in its comments, CLEC demand for dedicated interoffice transport is inherently “point-to-point.” The availability of an alternative source of transport from Office A to Office B is irrelevant if the CLEC needs transport from Office A to Office C. Giving the ILEC an exemption from providing

unbundled transport to that CLEC from Office A to Office C because an alternative fiber ring exists between Office A to Office B clearly would impair that CLEC's ability to provide service.

The statistics presented in Covad's comments and others clearly demonstrate that alternative interoffice transport networks of the size and scale of the ILEC interoffice networks simply do not exist. In four major metropolitan areas (New York, Chicago, San Francisco and Washington DC), Covad showed that approximately 84% of its dedicated interoffice transport demand can be met *only* by the local ILEC. AT&T put forward similar evidence, which showed that 82% of its demand for transport is served by the ILEC.⁷ As Covad and other CLECs expand their collocation footprint faster than fiber CLEC deployment, they will become even *more* dependent on unbundled dedicated interoffice transport.

Therefore, all ILEC proposals that would grant an exemption from transport unbundling on an office-by-office basis, dependent solely upon whether alternative fiber has been or could be deployed in that office,⁸ must be rejected. These ILEC proposals ignore the fundamental reality that CLECs demand dedicated interoffice transport on a point-to-point basis and that ILECs continue to dominate this market overwhelmingly.

Another example of how ILECs have misapplied economics arises in their arguments that the presence of a single collocated CLEC is sufficient to grant an exemption from unbundling dedicated transport – even if that CLEC has not actually

⁷ AT&T Comments at 121-122; *see also* Sprint Comments at 31-33 and Appendix E (describing non-ubiquity of alternative transport providers); Allegiance Comments at 21-22; ALTS Comments at 50.

⁸ Ameritech Comments at 6, 87-94; SBC Comments at 45-51; Bell Atlantic Comments at 26-31; BellSouth Comments at 47-53; GTE Comments at 59-63.

pulled fiber to that office.⁹ Despite USTA's admonitions that the Commission avoid any "Efficient Competitor Standard" that would require the Commission to predict what an "efficient" CLEC network build would be,¹⁰ these ILECs ask the Commission to base its decision regarding unbundling on the agency's conclusion as to whether an efficient CLEC should be forced to pull its own fiber to any given office.

That result is clearly contrary to the purposes of the unbundling provisions of the 1996 Act, which were designed to facilitate entry into telecommunications markets *without* huge sunk cost investments. In addition, as Covad discussed in its Comments, the availability of one actual or hypothetical supplier does not mean that an actual, competitive wholesale market for a UNE substitute exists.¹¹

⁹ See SBC Comments at 50 (no unbundled transport from office with density of 40,000 lines and one collocated CLEC); Ameritech Comments at 94 (no unbundled transport from office with 40,000 or more lines with existing collocation arrangements); U S WEST Comments at 51 (presumption that no unbundled transport necessary in office with 40,000 lines and one collocated CLEC, even if no CLEC fiber in that office); GTE Comments at 59-63 (no unbundled transport in offices with more than 15,000 lines, based on presumption of self-provisioning).

¹⁰ USTA Comments at 110.

¹¹ RBOC economists are, of course, very adept at citing the harms of concentrated markets when arguing for RBOC entry into the long distance market. See, e.g. Long Distance Affidavit of Robert G. Harris, on behalf of GTE Corp., *Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control*, CC Docket NO. 97-211, March 13, 1998. Mr. Harris's argument in the MCI-WorldCom merger that the existence of the "Big Three" interexchange carriers does not demonstrate that the long-distance market is competitive stands squarely at odds with his argument in this proceeding that one theoretically viable alternative supplier creates sufficient competition so as to warrant an exemption from unbundling. Joint Affidavit of Debra. J. Aron and Robert G. Harris on behalf of Ameritech, Attachment to Ameritech Comments, at 32 (unbundling need not be required if it is "possible" that "at least one potential competitor" would self-supply or purchase the element from another source in a manner that would cause "viable" entry). Despite lip service to the DOJ/FTC Horizontal Merger Guidelines, *id.* at 38-39, 41-42, Aron's and Harris's apparent conclusion that no ILEC market power exists in the presence of one actual or "viable" potential entrant stands directly contrary to any reasonable application of industrial economics and antitrust law. See, generally, F.M. Scherer & David Ross, *Industrial Market Performance and Economic Performance*, Ch. 11, 446 (1990) (describing structure-conduct-performance paradigm and observing that "[e]vidence of the exercise of monopoly power – the power to raise price above marginal costs – arises in concentrated industries. That power appears to be wielded not collectively but rather by the leading seller, especially if that firm has a cost or price advantage over its rivals.").

Indeed, the theoretical model submitted by Ameritech (the Fitzsimmons Affidavit¹²) in support of its “viable” entry proposal contains fatal flaws –

- In discussing the cost of entry via unbundled loops, Fitzsimmons is seemingly unaware of Ameritech’s shocking one-time “special construction” costs for providing many unbundled loops. As Covad and others have documented, these special construction charges are assessed by Ameritech in the amount of \$2000-\$7000 *per loop* in many instances.¹³
- Fitzsimmons, with no cost support, assumes a nonrecurring collocation cost of \$60,000.¹⁴ This \$60,000 apparently includes ILEC central office charges, the CLEC’s cost of acquiring collocated equipment, and the CLEC’s cost of actually installing that equipment. Based on its actual experience, Covad estimates that Fitzsimmons understates those costs by several factors.¹⁵

These flaws should cause the Commission to question every one of the assumptions made by Fitzsimmons. But even with these mistakes, Fitzsimmons’s results show that competitive entry will not be broad-based or robust if the Commission imposes the restrictions on unbundled access built into the model. Even these faulty “best-case” results for Indianapolis, Columbus and Toledo show entry into the most-dense urban areas for only three entrants – only one of which would be a completely new entrant. And this entry would be far from broad-based, as only two of those three entrants would build out to a few less-dense central offices.¹⁶

¹² See Affidavit of William L. Fitzsimmons on behalf of Ameritech, Attachment to Ameritech Comments (“Fitzsimmons Aff.”).

¹³ See Covad June 3 *Ex Parte*, Comments of McLeodUSA at 5-7. Bell Atlantic has proposed similar historic cost charges. Covad June 3 *Ex Parte*.

¹⁴ Fitzsimmons Aff. at 16.

¹⁵ Indeed, in most Bell Atlantic states, Bell Atlantic quotes for providing Covad physical collocation space have averaged well above \$60,000 – and this does not include *any* costs that Covad must still incur to procure and install its DSLAMs. See also Sprint Comments at 36 (cage collocation costs an average of \$92,000 for Southwestern Bell and up to \$358,000 for Pacific Bell).

Indeed, Fitzsimmons admits that unbundled loop costs are a critical variable, as the absolute price of loops plays a major role in the results of the study.¹⁷ Tellingly, Fitzsimmons's results depend on the ubiquitous availability of unbundled loops, and Fitzsimmons does not attempt to demonstrate the impact on entry that Ameritech's proposal for limitations on the availability of unbundled loops would have.¹⁸ The model also observes that the availability of interoffice transport facilities from Ameritech materially increases the profitability and likelihood of entry by a new CLEC¹⁹ – meaning that denial of that access clearly “impairs” CLEC entry.

Finally, even with its *Alice in Wonderland* assumptions, Fitzsimmons concludes that that in 10 years, Ameritech will retain a dominant (70%) share of the access lines in these dense urban areas, and will presumably have an even greater share in less-dense areas.²⁰ Entry will be limited to a few lucky competitors because of the high sunk costs of entry and other entry barriers. As industrial organization economics demonstrates, the potential for noncompetitive market prices and artificially restricted industry output in a market with such a structure is clear.²¹

¹⁶ Fitzsimmons Aff. at 23, 24, 29.

¹⁷ *Id.* at 24 (describing how competitive penetration into Indianapolis and Columbus varies on the basis of density and unbundled loop prices).

¹⁸ Compare Ameritech Comments at 106 (“[A]ccess to the incumbent’s local loop is not necessary to provide a meaningful opportunity for competitive entry by efficient competitors.”); with Fitzsimmons Aff. at 2 (“I used the LECG Entry Model to simulate the financial performance of reasonably efficient competitive entrants in selected geographic areas under the assumption[] that . . . unbundled loops are available from the incumbent local exchange carrier (ILEC) at current prices.”).

¹⁹ *Id.* at 25.

²⁰ *Id.* at 15, Table 2.

²¹ See generally, Scherer & Ross, Chap. 11.

Hypothetical studies cannot change the actual facts: for a variety of reasons, including the presence of substantial barriers to entry and sunk cost investment, ubiquitous and complete facilities-based entry into the interoffice transport and loop distribution facilities simply has not happened yet at the scale necessary to support unbundling exemptions.²² Entirely absent from the ILEC submissions is a complete competitive analysis as to whether any actual, competitive wholesale market exists for a substitute for loops, transport and high-capacity DS3 links.

Whether the ILECs like it or not, the focus of Section 251(d)(2) is on whether the particular carrier that requests unbundled access has an alternative source of supply. The focus is not whether a choice exists in theory or whether one CLEC, if it implemented a particular business plan, may not need that particular element. The Section 251(d)(2) focus must be on whether the *particular requesting carrier* can still provide the services *it* seeks to provide, by acquiring the particular functionality of the requested element in a wholesale market that actually exists.

For example, the fact that retail cellular/PCS prices may have dropped²³ is irrelevant if Covad seeks to provide xDSL over unbundled loops – because retail cellular/PCS services are not a substitute input for copper loops for xDSL service. And while AT&T may soon be able to provide telephone over an upgraded cable plant in Fremont, California, Covad and other CLECs that do not possess a cable plant do not

²² Several ILECs correctly point out that CLECs and CAPs have been building fiber networks for years. *See, e.g.*, BellSouth at 47, US WEST Comments at 48-49. Covad does not dispute this fact. But the truly relevant fact that the Commission should draw from this history is that fiber CLECs can only theoretically provide less than 15% of Covad's demand for dedicated interoffice transport, and the number of fiber CLEC "on-net" buildings is a tiny percentage of the total number of buildings nationwide.

²³ SBC Comments at 29-30; Bell Atlantic Comments at 38; BellSouth Comments at 74.

have that option. Development of these other transmission media have little relevance to the question as to whether a different CLEC “needs” access to unbundled copper loops to provide service or whether denial of access to those unbundled copper loops would “impair” that CLEC’s ability to offer broadband services utilizing xDSL technology.

II. THE COMMISSION SHOULD ENSURE THE NATIONWIDE AVAILABILITY OF DESIGNATED ELEMENTS

Covad and others have put forward a clear vision of the industry’s future – a vision in which rival service providers build innovative networks capable of supporting advanced services simultaneously in markets across the nation. It is also a vision in which regulators and consumers will no longer have to accept ILEC “excuses” for their refusal to unbundle or provide advanced services. This section outlines some of the issues related to this vision that were raised in initial comments.

A. The Commission Should Order Line Sharing as an Unbundled Network Element

One key aspect of local loop unbundling proposed by Covad and other CLECs is the availability of line sharing.²⁴ In particular, since line sharing provides CLECs with access to the data frequencies of a loop in the same manner that the incumbent LEC

²⁴ See Covad Comments, Attachment 1 at § 51.319(a)(6)(a); Northpoint Comments at 14-15; MCI Comments at 45-50 (giving CLECs the option to identify a loop by the transmission bandwidth needed by the CLEC); NAS Comments at 23-31. In March, the Commission tentatively concluded that it should order ILECs to provide line sharing. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 99-48 (rel. March 31, 1999) (“*Advanced Wireline Services Order and FNPRM*”) at ¶ 103. Covad will be providing extensive comments in that docket in support of line sharing on June 15, 1999.

provides DSL services to itself and ISPs, it is compelled under the statutory nondiscrimination provisions of Title II and Sections 251(c)(2) and (c)(3).²⁵

In their interstate ADSL tariffs, GTE, SBC, Bell Atlantic and BellSouth have justified their ADSL prices on the basis of a *zero* loop cost, reasoning that because loop costs are already fully recovered from voice services, there is no incremental cost associated with adding DSL service to that loop.²⁶ As a result, ILECs provide ADSL service to consumers and Internet Service Providers at price points that data CLECs cannot match, because those CLECs must acquire a second loop to the customer premises and pay the ILEC upwards of \$20-25 per month for leasing the loop UNE.

ILEC refusals to provide line sharing to CLECs clearly impair CLEC's ability to provide broadband services utilizing xDSL technology to residential and small business users. Indeed, for many consumers, line sharing may be the *only* means in which that consumer may have a choice of xDSL service providers – because that particular consumer may only have one twisted copper pair going to their house. For example, dozens and dozens of Covad's loop orders have been "held" by U S WEST for this very reason. Competitive DSL service to these consumers is more than "impaired" by U S WEST's refusal to provide line sharing – it is denied outright.

²⁵ See Petition to Reject, or to Suspend and Investigate, of Covad Communications Company, *In the Matter of Bell Atlantic Tel. Cos., Access Service Tariff* FCC Nos. 1 and 11, Transmittal No. 1138, May 26, 1999 (Commission should exercise Title II authority to order line sharing as an access service)

²⁶ See *In the Matter of GTE Telephone Operating Cos.*, Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 (rel. Oct. 30, 1998); *In the Matter of Bell Atlantic Telephone Cos.*, Transmittal No. 1076, *BellSouth Telecommunications, Inc.*, Transmittal No. 476, *GTE System Telephone Cos.*, Transmittal No. 260, *Pacific Bell Telephone Co.*, Transmittal No. 1986, CC Dockets Nos. 98-168, 98-161, 98-167, 98-103, Memorandum Opinion and Order, FCC 98-317 (rel. Nov. 30, 1998).

Access to shared loop facilities cannot be opposed by incumbent LECs on the basis of any legitimate technical or operational considerations. ILECs have made clear that they can overcome the operational, customer and billing issues that arise from its “wholesale” relationship with an ISP that “resells” the DSL service while the ILEC continues to provide the voice service.²⁷ It is discriminatory for ILECs to take the position that they cannot manage a similar relationship with CLECs.

As the Commission noted in its March 31, 1999 *Advanced Services Order and FNPRM*, line sharing advances the public interest goals of facilitating customer choice and innovation.²⁸ Customers should not have to be forced to purchase two services (voice and high-speed data) from one provider if the customer wishes to purchase these two distinct services from two different providers. Similarly, a CLEC should not be forced to provide two services to consumers when it only wants to provide one service. Forcing a requesting carrier to acquire more unbundled functionality from the ILEC network than it needs clearly “impairs” the requesting carrier’s ability to provide the (high-speed data) service it “seeks to provide.”

B. Availability and Pricing of Conditioned Loops

1. Conditioning Loops is not a “Superior” Service

SBC and GTE have argued that an ILEC should not be required to offer conditioned loops in areas where the ILEC does not provide conditioned loops for its own

²⁷ See, e.g. Bell Atlantic Trans. No. 1138, Tariff FCC No. 1, Section 16.8(F)(4)(a); Tariff FCC No. 11, Section 17.4.7(A) (requiring ISPs that purchase under BA’s volume and term discount plan must “deal directly with its end users” with regard to “all matters relating to the [ADSL] service, including marketing, ordering, installation, maintenance, repair, billing and collections.”).

²⁸ *Advanced Wireline Services Order and FNPRM* at ¶ 94 (“each end user customer should be able to choose from a broad array of services and from whom to obtain these services.”).

services because this constitutes a requirement that the ILEC provide a “superior service.”²⁹

This argument comes too late in the day. In the *Local Competition Order*,³⁰ the Commission specifically directed ILECs to provide local loops “conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals.”³¹ Even though ILECs successfully argued against the Commission’s “superior quality” rule, the Eighth Circuit only “str[uck] down the Commission’s rules requiring incumbent LECs to substantially alter their networks in order to provide superior quality interconnection.”³² The Eighth Circuit specifically “endorse[d] the Commission’s statement that the obligations imposed by Sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities necessary to accommodate interconnection or access to network elements.”³³ No party appealed this aspect of the Eighth Circuit’s decision to the Supreme Court.

Even so, given the very broad discretion under Section 201(b) construed by the Supreme Court in *Iowa*, the Commission certainly can justify a rule that would accomplish the competitive and public interest objectives of the original “superior

²⁹ SBC Comments at 77-80; GTE Comments at 86-87.

³⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part sub nom., Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff’d in part and vacated in part sub nom., Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (“*Iowa*”), *rev’d in part and aff’d in part and remanded sub nom, AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

³¹ *Local Competition Order* at ¶ 380. The Commission flatly rejected ILEC arguments that CLECs “take the LEC networks as they find them,” *id.* at ¶ 382, and should rule the same way again here.

³² *Iowa*, 120 F.3d at 813 n.33.

³³ *Id.*

quality” rule. Ordering the conditioning of loops capable of supporting digital services – regardless of ILEC deployment plans – advances several public interest objectives, including the goals of broadband deployment and in ensuring nondiscriminatory access to unbundled loops by CLECs.

The claim that providing conditioned loops constitutes the provision of a “superior” service is simply incorrect. SBC and GTE, like every other ILEC, “conditions” loops for itself *every day*. Thus, the argument that loop conditioning constitutes a “superior” service is thus demonstrably false.

ILECs “condition” their outside copper loop plant to maximize suitability of that plant for a variety of analog and digital services, such as POTS, ISDN, frame relay, and HDSL T1 services. The type of conditioning work at issue here –removing an analog load coil or bridge tap, possibly a spectral interference check – is precisely the same type of work the ILECs undertake to provide an ISDN line, a frame relay circuit, or a T1 line that uses HDSL technology.³⁴

For example, SBC’s current interconnection agreement with Covad (and presumably other CLECs) defines *one* loop element for both ISDN and DSL uses – a “Digital ISDN/xDSL Capable Link.”³⁵ This is a clear recognition that the conditioning

³⁴ ILECs have been deploying xDSL technology for years to support business T1 service. See Paradyne Corp., *DSL Sourcebook 2nd Edition*, Ch. 3 http://www.paradyne.com/sourcebook_offer/sb_html.html (describing deployment of HDSL in early 1990’s). ILEC deployment of HDSL has ignored residential consumers. More than three years ago, Dataquest report stated that “[h]igh-speed digital subscriber line (HDSL) has continued to gain acceptance within telcos. . . . Some vendors are now targeting the residential market and proposing HDSL solutions for consumers.” Eileen Healy, Dataquest Perspective PNEQ-NA 9601 (April 15, 1996) at 1.

³⁵ Interconnection Agreement between Covad Communications Company and Pacific Bell, Section 2.1 (April 21, 1997).

services for the two technologies are precisely the same, and Covad has been providing DSL services over ISDN/xDSL loops in California for 18 months.

The loop conditioning process is part of the routine work and “modifications” that ILECs perform on outside plant. The process of conditioning a loop to support DSL service is often nothing more than “de-conditioning” the existing outside plant. The fact is that generally the most “low tech” of copper loops – an unencumbered twisted copper pair – best supports DSL services. The presence of analog load coils and repeaters on copper loops that “enhance” the analog POTS frequencies on those loops affirmatively halt transmission of other frequencies usable for higher bandwidth digital services.³⁶

In short, modifying the outside plant to suit particular digital or analog services is part of the normal, every day operations of ILEC outside plant engineers and line workers. Requesting that an ILEC condition a particular loop is *not* asking the ILEC to build a “superior” network – it is only asking the ILEC to perform a routine modification that it performs every day on the “existing” network. Such a requirement was fully contemplated and permitted by the Eighth Circuit in its *Iowa* decision.

Only a telecom monopolist could argue that de-conditioning loops by *removing* analog encumbrances or bridge taps requires it to build a “superior network.” The pure network for DSL services is already built, it “exists”³⁷ – it is simply trapped inside the analog, circuit-switched world of the ILECs. The ILECs have limited the

³⁶ Covad Communications Company Working Paper Series No. 1, *Defining Digital Loops* (1998), <http://www.covad.com/about/policy.html>.

³⁷ *DSL Sourcebook* at Preface (“The copper wire telephone infrastructure is everywhere.”). The Eighth Circuit decision did not challenge the FCC’s ability to order access to the “existing network” of the ILEC, just the FCC’s ability to order access to an “unbuilt superior one.” *Iowa Util. Bd.*, 120 F.3d at 813.

communications potential of the network by their own actions, and locking in those limitations is wholly contrary to the objective of bringing broadband capabilities to all Americans.

2. Charges for Conditioning Loops to Support Digital Services are Discriminatory and Inconsistent with Pricing UNEs on a Forward-Looking Basis

Several ILECs have argued that they will condition loops to support DSL and other digital services – but only if the CLEC will pay for the cost of conditioning.³⁸ Covad and other CLECs have documented the egregiously excessive conditioning charges that ILECs have sought to impose.³⁹ These charges, left unchecked, clearly will stifle the deployment of Advanced Services. The Commission should write its unbundled loop rule as Covad and ALTS proposed in opening comments to make the point clear that imposing conditioning charges for digital loops is discriminatory and inconsistent with the Commission's UNE pricing rules.⁴⁰

ILEC proposals to impose conditioning charges on specific loops are nothing more than attempts to apply historical cost pricing, rather than the forward-looking, TELRIC-based UNE pricing regime required by the Commission's rules. The forward-looking cost for *all* loops already includes any necessary conditioning to support analog or digital services over that loop.

³⁸ See, e.g., SBC Comments at 77; BellSouth Comments at 36.

³⁹ See Covad June 3 *Ex Parte*; McLeodUSA Comments at 5-7.

⁴⁰ Including, but not limited to, 47 C.F.R. §§ 51.503(c) (UNE rates “shall not vary” on the basis of “the type of services that the requesting carrier purchasing such elements uses them to provide”); 51.505(a)(1) (UNE prices based on efficient network configuration), 51.505(d)(1) (disallowing “embedded” or historical costs); 51.505(d)(4) (disallowing UNE revenues to subsidize other service offerings); 51.509(a) (UNE loop costs “shall be recovered through flat-rated charges”).

In an efficient, forward-looking network, the cost of an individual local loop does not depend on whether it is to be used for analog or digital service. When an ILEC builds outside plant today, it does not construct an “analog outside plant” that would have to be converted to support digital applications through high, one-time nonrecurring charges. A rational ILEC makes its “green field” network construction decision based upon a projected “mix” of POTS and high bandwidth digital services (HDSL T1, frame relay, ISDN, and xDSL). The composition of that analog/digital mix is based upon the projected consumer demand and the labor costs of maintaining and converting that outside plant between analog and high bandwidth digital services for particular end users.

Seen in this light, it is clear that “conditioning” a loop on that outside plant to suit a particular analog service (*e.g.*, inserting an analog load coil) or a particular digital service (*e.g.*, removing an analog load coil) is essentially the same function. When a CLEC obtains an “analog unbundled loop”, no \$1,000 charge is assessed if the ILEC actually has to install a analog load coil on that loop – those costs are already properly built into the monthly rate. But companies like Bell Atlantic, SBC and Ameritech believe that CLECs that order a “digital unbundled loop” should have to pay for removal of that same equipment. These pricing proposals assume that the ILEC’s *forward-looking*, efficient design of outside plant would only support analog services – a patently incorrect assumption.

In short, the forward-looking cost for the loop already includes the process of conditioning loops for analog or digital services. The Commission should definitively declare that charging data CLECs the historic (or actual) costs of conditioning for digital

services permits double-recovery, is discriminatory, and violates the Commission's unbundled element pricing rules.

III. CONCLUSION

In conclusion, incumbent LECs have treated this proceeding as an opportunity to pummel the FCC with a myriad of restrictions on unbundled access that would not realize the goals of the 1996 Act to promote rapid entry into all telecommunications markets and the deployment of advanced services. As Covad warned in its initial comments, the ILECs would like nothing other than to engage consumers, CLECs, the Commission, and state PUCs in endless litigation and haggling over which end users are "worthy" of enjoying the benefits of competitive entry by carriers using unbundled elements.

Fortunately, far more reasonable approaches were proposed by the competitive industry. CLECs have submitted compelling cases supporting nationwide unbundling rules. The end result of this proceeding should be clear, predictable, and national rules that will leave no "wiggle room" for continued ILEC refusals to provide unbundled access.

Respectfully submitted,



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